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13
14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17
18 MOONBUG ENTERTAINMENT LIMITED
and TREASURE STUDIO, INC.,

19 Plaintiffs,

20 v.

21 BABYBUS CO., LTD and BABYBUS
22 (FUJIAN) NETWORK TECHNOLOGY
CO., LTD,

23 Defendants.

Case No: 3:21-cv-06536-EMC

**BABYBUS DEFENDANTS' OPPOSITION
TO MOONBUG PLAINTIFFS' MOTION
FOR ENTRY OF PERMANENT
INJUNCTION**

*[Concurrently filed with Declarations of
Naiyong Yan and Aaron Perahia]*

Date: October 5, 2023

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Judge: Hon. Edward M. Chen

Courtroom: 5, 17th Floor

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INTRODUCTION

Following the jury’s delivery of a verdict that cannot be sustained under Ninth Circuit law, Moonbug now attempts to further subvert copyright law. It seeks an unprecedented permanent injunction against a competitor’s creative work, as well as content not presented at trial, based on a hopelessly vague verdict form and unfounded speculation about irreparable harm. Even if the verdict ultimately survives post-trial motions and appeal (which it should not), the injunction Moonbug requests is fatally vague and overbroad as to the acts that it would restrain or require. Because Moonbug falls far short of satisfying the stringent requirements for a permanent injunction, the Court should deny it now. Alternatively, if the Court determines some injunctive relief is warranted, the ruling on this motion should reserve the proper scope of injunctive relief, leaving it subject to amendment, until after resolution of BabyBus’ Rule 50(b) motion.

First, Moonbug has failed to show irreparable harm or that money damages are inadequate. Moonbug’s actions undermine its claim of irreparable injury. It delayed bringing its claims until years after the introduction of Super JoJo, and, during the years of litigating those claims, it never sought a preliminary injunction. Unsurprisingly, it lacks evidence that any intangible harm occurred during the four years since BabyBus introduced Super JoJo, and it offers only speculation about irreparable harm that might occur. This alone compels denial of injunctive relief.

Second, the balance of hardships weighs against the injunction Moonbug seeks. The only hardship Moonbug articulates is speculative. By contrast, the sweepingly broad injunction Moonbug seeks imposes unreasonable and unwarranted burdens on BabyBus. For example, it would require deactivating more than a dozen BabyBus YouTube channels—irrespective of *whatever* content they contain.

Third, the injunction threatens the public interest and thwarts the goals of copyright. Not only would the injunction result in significant economic waste, but it would effectively eliminate CoComelon’s chief competition from the preschool animation genre while simultaneously chilling creativity and competition from third parties in the market. Moonbug has not pointed to a single decision in which an injunction issued under remotely similar circumstances.

1 **Fourth**, the jury’s verdict does not support the scope of relief Moonbug seeks. At Moonbug’s
 2 urging, the verdict form reflects the jury’s finding that certain Moonbug copyrights were
 3 infringed, but it does not identify what BabyBus content infringed them. Without clear findings from
 4 the jury, injunctive relief cannot be narrowly tailored as the law requires.

5 **Fifth**, Moonbug’s proposed injunction fails to state its terms specifically and describe in
 6 reasonable detail the acts restrained or required, as Rule 65 requires.

7 **Finally**, the Court need not rule on Moonbug’s motion now. It can deny the motion without
 8 prejudice to renew after BabyBus’ Rule 50(b) motion and/or appeal is resolved. Alternatively, the
 9 ruling on this motion can reserve the proper scope of injunctive relief, leaving it subject to
 10 amendment, until after resolution of BabyBus’ Rule 50(b) motion. The jury verdict has major defects
 11 and resolving BabyBus’ Rule 50(b) motion may significantly affect the proper scope of injunctive
 12 relief. Further, if the Court is inclined to grant any injunction, the Court should stay its
 13 implementation long enough to allow BabyBus to move for a stay under Rule 62.

14 As discussed more fully below, BabyBus respectfully requests that the Court deny
 15 Moonbug’s motion for a permanent injunction.

16 **ARGUMENT**

17 **I. A PERMANENT INJUNCTION IS UNWARRANTED.**

18 A permanent injunction is “an extraordinary and drastic remedy that is never awarded as of
 19 right.” *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 980 (9th Cir. 2011) (citation omitted). The
 20 Supreme Court has “consistently rejected invitations to replace traditional equitable considerations
 21 with a rule that an injunction automatically follows a determination that a copyright has been
 22 infringed.” *eBay, Inc. v. MercExchange*, 547 U.S. 388, 392-93 (2006). Rather, to obtain a permanent
 23 injunction, a plaintiff must establish: “(1) that it has suffered an irreparable injury; (2) that remedies
 24 available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,
 25 considering the balance of hardships between the plaintiff and defendant, a remedy in equity is
 26 warranted; and (4) that the public interest would not be disserved.” *Id.* at 391.

27 Even if this showing is made, whether to grant the injunction remains in the equitable
 28 discretion of the Court. *See eBay*, 547 U.S. at 391. “An injunction should issue only where ... equity

1 ‘is essential in order effectually to protect property rights against injuries otherwise irreparable.’”
 2 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311, 312 (1982) (citation omitted).

3 **A. Moonbug Has Not Shown Any Non-Speculative Threat of Irreparable Harm.**

4 An injunction is improper where it does not “guard against any present or imminent risk of
 5 likely irreparable harm.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 162 (2010). “Harm
 6 must be proved, not presumed.” *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 1000
 7 (9th Cir. 2011) (citation omitted). Irreparable harm requires “a real or immediate threat of imminent
 8 harm in the future.” *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 937 n.3, 938 (N.D. Cal. 2009).

9 1. Moonbug’s Years-Long Delay Refutes Any Notion of Irreparable Harm.

10 Moonbug’s years of delay in seeking injunctive relief weighs heavily against any claim of
 11 irreparable harm. Before filing suit, Moonbug knew about Super JoJo for years, even collaborating
 12 with it during 2020 and continuing efforts to partner with it in 2021.¹ At the time, Moonbug did not
 13 raise any copyright infringement concerns about Super JoJo. Tr. 1480:24-1481:1 (Lin). Nor had
 14 Moonbug ever raised such concerns with BabyBus about Super JoJo before. Tr. 1481:2-5 (Lin).
 15 Moonbug cannot credibly claim irreparable harm when it has known for years about the activities

17 ¹ See, e.g., Tr. 1587:8-15 (Yan) (testifying BabyBus released the first Super JoJo videos in May to
 18 June 2019); Tr. 1470:25-1471:11 (Lin) (Moonbug contacted BabyBus in January 2020 about
 19 collaborating); TE 2372 (Moonbug email to BabyBus in May 2020, copying Moonbug founder
 20 John Robson, and stating Mr. Robson is “interested [in] chatting ... about a deeper strategic
 21 relationship”); TE 2373 (Moonbug responsive email to BabyBus in May 2020, stating “Mr. Robson
 22 sees the cooperation you and I are embarking on ... as a great opportunity”); Tr. 1474:3-23 (Lin)
 23 (testifying Moonbug’s YouTube manager, Helen Wong, contacted BabyBus in October 2020 to seek
 24 use of BabyBus’ IP in Super JoJo for a Christmas special); Tr. 1475:9-19 (Lin) (testifying Moonbug’s
 25 Ms. Wong had watched all of BabyBus’ Super JoJo videos as of November 2020); Tr. 1476:17-19
 26 (Lin) (testifying Moonbug and BabyBus in fact collaborated on a cross-promotion Christmas special
 27 in 2020); Tr. 1476:10-14, 1476:21-1479:15 (Lin) (testifying about Moonbug’s outreach in March
 28 2021 to partner with BabyBus on its Super JoJo content); TE 2367 (March 2021 email from Moonbug
 founder Mr. Robson, copying Moonbug business and acquisition managers); TE 2368 (March 2021
 response from Mr. Robson stating Ms. Wong would contact BabyBus by WeChat to discuss further);
 TE 2511 (March 2021 WeChat message from Ms. Wong to BabyBus, stating “the reason why our
 CEO John contacted you is because he is interested in your baby bus and SuperJoJo and wants to
 work together”; “[i]n terms of cooperation, this project, we hope to conduct licensing transactions
 and establish cooperative relations with you”); Tr. 1479:16-1480:19 (Lin) (testifying Moonbug
 arranged a conference with BabyBus in spring 2021 in which they discussed “several potential
 models for cooperation.”).

1 about which it now complains. Further, even after Moonbug finally filed its complaint, it took no
 2 action to address any so-called irreparable harm. It did not seek a preliminary injunction at the outset
 3 of this case, nor did it move for one during or after discovery.

4 Moonbug's past actions speak louder about "irreparable harm" than its present words. *See*
 5 *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532, 1542 (2d Cir. 1992) ("Actions speak louder
 6 than words, and motions speak loudest of all. Since [plaintiff] itself apparently concluded that the
 7 economic loss it was suffering, if any, did not warrant a remedy from the outset of this action, we
 8 cannot say that the district court abused its discretion" in denying an injunction). If Moonbug's "true
 9 goal was to defend its right to exclude, it would likely have at least *attempted* to stop" BabyBus
 10 "during the lengthy litigation period." *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 573
 11 (E.D. Va. 2007) (denying permanent injunction in patent case after remand from *eBay, Inc. v.*
 12 *MercExchange*, 547 U.S. 388). That Moonbug did not "suggests that [plaintiff] itself concluded that
 13 remedies at law would be adequate to address its injury." *Active Sports Lifestyle USA, LLC v. Old*
 14 *Navy, LLC*, 2014 WL 1246497, at *3 (C.D. Cal. Mar. 21, 2014) (denying permanent injunction in
 15 trademark case). Moonbug's years of not seeking injunctive relief mute Moonbug's current position.

16 2. Moonbug's Irreparable Harm Arguments Lack Merit.

17 None of Moonbug new assertions of irreparable harm (Mot. 8-9) have merit.

18 **First**, Moonbug has not shown concrete evidence of harm to its reputation and goodwill.
 19 Although "loss of control over business reputation and damage to goodwill could constitute
 20 irreparable harm," a moving party must produce *evidence*, not just "platitudes." *Herb Reed Enters.,*
 21 *LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013) (vacating preliminary injunction
 22 in trademark case in light of *eBay, Inc. v. MercExchange*, 547 U.S. 388), *superseded on other*
 23 *grounds by statute as stated in Trial Laws. Coll. v. Gerry Spence Trial Laws. Coll.*, 23 F.4th 1262,
 24 1270 (10th Cir. 2022). Conclusory assertions do not suffice in contested motions; "concrete evidence
 25 in the record" is required. *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747, 756, 761 (9th Cir.
 26 2018) (reversing preliminary injunction as to defendant's "Cross Court" shoe because plaintiff
 27 "failed to provide concrete evidence" of irreparable harm, even though it found no error in district
 28 court's determination that plaintiff was likely to succeed on the merits of its trademark infringement

1 claim, affirming injunction as to defendant’s other accused shoe); *cf.* Mot. at 9 (citing default
 2 judgment decisions, such as *CNC Software, LLC v. Global Engineering Ltd Liability Co.*, 2023 WL
 3 3409463, at *7 (N.D. Cal. May 12, 2023), where plaintiffs’ injunction motions are uncontested and
 4 their allegations of harm untested). “Speculative injury does not constitute irreparable injury.”
 5 *Goldie’s Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 471-72 (9th Cir. 1984) (vacating injunction
 6 where hypothetical loss of goodwill and customers was “speculative”).

7 The record here provides no nonspeculative basis to conclude that Moonbug faces irreparable
 8 harm to its reputation or goodwill from BabyBus. Those issues were not addressed at trial, where no
 9 one even mentioned the words “reputation” or “goodwill.” The only trial testimony concerning
 10 “harm” Moonbug referenced (Mot. 6) did not articulate any negative impact to Moonbug’s reputation
 11 or brand in the eyes of consumers.² Rather, the testimony Moonbug cites is purely speculative as to
 12 any harm. Mot. 6 (quoting Mr. Benoy’s “if ... then ...” testimony). Further, Mr. Benoy’s speculation
 13 was premised on his claims about YouTube’s algorithm—an issue on which he demonstrated no
 14 personal knowledge or competency as an expert to testify about.³ And neither of the declarations
 15 Moonbug submitted from two fact witnesses—Mr. Benoy and Mr. Hagan—identify any harm to
 16 Moonbug’s reputation or goodwill. *See* Dkts. 597, 598.

17 Moonbug’s showing is inadequate to establish irreparable harm to its reputation or goodwill.
 18 *See, e.g., Greg Young Publ’g, Inc. v. Zazzle, Inc.*, 2020 WL 3871451, at *4 (C.D. Cal. July 9, 2020)
 19 (rejecting asserted reputational harm as conclusory where plaintiff’s owner declared the infringement
 20 impacted the sales and resulted in a lower-quality infringing product in the market); *Qualcomm Inc.*
 21 *v. Compal Elecs., Inc.*, 283 F. Supp. 3d 905, 919 (S.D. Cal. 2017) (rejecting asserted goodwill harm
 22

23
 24 ² Although unsupported, Moonbug’s theory that Super JoJo and CoComelon were “indistinguishable
 25 to young viewers” (Mot. 9), precludes it from credibly asserting that Super JoJo weakened
 consumers’ perceptions of CoComelon or Moonbug’s reputation and goodwill (Mot. 9).

26 ³ Accordingly, BabyBus objects to reliance on Mr. Benoy’s cited testimony concerning YouTube’s
 27 algorithm works and the role of thumbnails. *See* Mot. 5-6, citing Tr. 956:5-23, 967:4-19, 968:7-24.
 28 It is speculative, lacks foundation, and is improper expert opinion by a lay witness. Fed. R. Evid.
 403, 602, 701. Moreover, the only expert with foundation on the subject, Denise Denson, clearly
 refuted Mr. Benoy’s speculation. Tr. 1225:10-12 (“thumbnails don’t drive search nor autoplay, as
 YouTube can’t identify what’s in a thumbnail”).

1 because plaintiff “made no particularized showing” and “conclusory assertions about the importance
 2 of goodwill ... are not enough”); *see also adidas*, 890 F.3d at 759-761 (holding district court abused
 3 its discretion in finding irreparable harm to reputation and brand because, even if consumer confusion
 4 existed, there was no evidence such confusion negatively impacted plaintiff’s brand or reputation).

5 **Second**, Moonbug’s arguments about consumer “confusion” and “deception” (Mot. 9-10)—
 6 core harms that *the Lanham Act* protects against—are irrelevant to this copyright infringement action,
 7 which has no trademark or false advertising claims. There is no statutory basis for finding
 8 “confusion” to be a ground for irreparable harm in a copyright case, particularly one that does not
 9 allege counterfeiting. The only authority Moonbug relies on citing consumer confusion as an
 10 irreparable harm in case without trademark or false advertising claims is an unpublished, out-of-
 11 district opinion with no analysis of relevance to copyright law that seems to have accepted the
 12 plaintiff’s position without question or support. Mot. 8-9 (citing *Mitchell v. 3PL Sys., Inc.*, 2013 WL
 13 12129617, at *3 (C.D. Cal. Apr. 8, 2013)).⁴ Moreover, *Mitchell* ignored the Ninth Circuit’s
 14 determination that “[h]arm must be proved, not presumed” in assessing injunctive relief in copyright
 15 infringement cases, *Flexible Lifeline Sys., Inc.*, 654 F.3d at 1000, treating the issue as still unresolved.
 16 2013 WL 12129617, at *3-4 (“courts have split over whether irreparable injury can be presumed or
 17 whether a party must prove irreparable injury”).

18 Even if *Mitchell* was correctly decided, its irreparable harm finding was based on expert trial
 19 testimony concerning consumer confusion and resulting irreparable harm. 2013 WL 12129617,
 20 at *4. Moonbug has never introduced comparable competent evidence—whether in discovery, or
 21 trial, or even in its moving papers now—or admissible evidence of even a single person being
 22 confused by BabyBus content, much less siphoned away from consuming CoComelon content.
 23 Mot. 13; *see also* Mot. 6; Tr. 968:10-24. In the absence of competent proof, Moonbug’s speculation
 24 about consumer confusion is meaningless. *See Perfect 10*, 653 F.3d at 982 (rejecting permanent

25
 26
 27 ⁴ Moonbug’s other two other cases involving “consumer confusion” both included Lanham Act
 28 claims. Mot. 8-9 (citing *Brighton Collectibles, Inc. v. Coldwater Creek, Inc.*, 2009 WL 10671767,
 at *1 (S.D. Cal. Jan. 23, 2009), and *Moonbug Ent. Ltd. v. HappyKidsTV*, 2022 WL 18859471, at *1
 (N.D. Cal. Dec. 15, 2022) (default judgment)).

1 injunction where plaintiff “failed to submit a statement from even a single former subscriber who
2 ceased paying for [plaintiff’s] service because of [infringing] content”).

3 **Third.** Moonbug has not shown—and cannot show—a “sufficient causal connection”
4 between the alleged irreparable injury and the conduct it seeks to enjoin, such that the injunction
5 would effectively minimize the risk of harm. *See Perfect 10*, 653 F.3d at 982 (affirming denial of
6 injunction where plaintiff failed to show “a sufficient causal connection between irreparable to
7 [plaintiff’s] business and [defendant’s] [infringing conduct]”); *see also Garcia v. Google*, 786 F.3d
8 733, 744 (finding a “mismatch” between the plaintiff’s substantive claim “and the dangers she hopes
9 to remedy through an injunction”). Moonbug bases its theory on Mr. Benoy’s conjecture about what
10 he thinks “could” happen when infringing content is on YouTube. Mot. at 6, citing Tr. 967:21-
11 968:25 (speculating that “if” another video is recommended next to a CoComelon video, and “if” a
12 user clicks on that other video, then it “creates a kind of unbreakable bond” between the videos”).
13 This is precisely the kind of baseless causal connection rejected by *Perfect 10*, 653 F.3d at 982.
14 Moonbug has no competent evidence that such a “bond” actually occurs—much less with videos on
15 BabyBus’ Super JoJo channels. Nor does Mr. Benoy’s speculation move the needle. He has no
16 foundation for his daisy chain of “if ... then” assertions; he is neither a YouTube expert nor has
17 personal knowledge of how its algorithm works. In fact, the central premise of Mr. Benoy’s
18 reasoning—that YouTube recommends videos based on thumbnail similarity—was refuted by the
19 only expert who testified on the subject. *See* Tr. 1228:12-229:1 (Denson) (“Thumbnails have zero
20 effect on driving search results, thumbnails have zero effect on driving autoplay, and thumbnails
21 have zero effect on driving what’s recommended.”). Moonbug does not show a “sufficient causal
22 connection” between the alleged irreparable injury and the conduct it seeks to enjoin.

23 **Fourth.** Moonbug’s reliance on the actions of “third-party users on YouTube” who uploaded
24 Super JoJo videos to YouTube (Mot. 10) does not support an injunction against BabyBus. Moonbug
25 does not contend BabyBus uploaded those videos or is affiliated with the third parties who did—nor
26 could it. *Id.*; Dkt. 596 ¶ 13. Moreover, Moonbug’s exhibit reflects that many of those third-party
27 videos were uploaded to YouTube over a year ago. *See* Dkt. 596-13. Moonbug evidently never sent
28 takedown notices for those third-party uploads, despite sending frequent takedowns when BabyBus

1 uploaded similar content. If Moonbug had a genuine concern over purported harm of those
 2 third-party videos, it would have sent takedown notices to YouTube for them long ago—or recently.
 3 Its failure to do so speaks volumes about Moonbug’s supposed harm. *See* 4 Nimmer on Copyright §
 4 14.06[A][3][c] (noting unreasonable delay can defeat irreparable injury and the length of time “need
 5 not be great”). Moreover, even if Mr. Hagan’s declaration regarding BabyBus’s supposed
 6 monetization of third-party content were reliable, which it is not,⁵ Moonbug’s concerns are
 7 misguided. 9/1/23 Declaration of Naiyong Yan (“9/1/23 Yan Dec.”), ¶ 5.

8 **Last**, Moonbug’s arguments that BabyBus is infringing to this day by uploading Super JoJo
 9 videos and displaying Super JoJo characters are baseless. *See* Mot. 11. Not only has this content not
 10 been shown to infringe (*see* Section II.B.2), but as set forth in Mr. Yan’s declaration, BabyBus has
 11 taken concrete steps to prevent any Super JoJo content from appearing on its accounts on United
 12 States based platforms pending post-trial motions and any appeal, including disabling the videos on
 13 those platforms and removing the artwork on its YouTube channels. 9/1/23 Yan Dec., ¶¶ 2-6. As
 14 Mr. Yan confirms, BabyBus will not re-enable such content absent authority from a United States
 15 court. *Id.* ¶ 6. Moonbug’s assertion that BabyBus’ opposition is “circumstantial evidence” of
 16 BabyBus’ “intent to continue to infringe CoComelon” therefore lacks merit. Mot. 13.

17 **B. Moonbug Has Adequate Legal Remedies As Monetary Damages Are More**
 18 **Than Sufficient To Compensate Moonbug.**

19 Even if Moonbug had presented concrete evidence of harm to its reputation, loss of
 20 customers, or BabyBus’ monetization of third-party content (which it has not), Moonbug has not
 21

22
 23 ⁵ BabyBus objects to the Declaration of Dane Hagan and attached exhibit (Dkts. 598 & 598-1).
 24 While Mr. Hagan claims familiarity with certain tools and “certain publishing data” (Dkt. 598 ¶ 2),
 25 his testimony about what “BabyBus can ‘claim,’” “if” predicate events happen (*id.* ¶ 3) lacks
 26 foundation as to what actually occurred, and it is speculative and irrelevant. He fails to identify any
 27 YouTube documents or any other evidence that would support the conclusions of paragraphs 5-8—
 28 even documents showing the application of his methodology actually results in revenue regarding
 other works. This renders the few statements he makes on personal knowledge (e.g., what he
 searched for, the screenshots he captured) irrelevant. The Court should exclude this speculative
 declaration in its entirety. Fed. R. Civ. P. 403, 602, 701. To the extent the Court is inclined to base
 any injunctive relief on this declaration, it should hold an evidentiary hearing at which Mr. Hagan
 can be subject to cross examination.

1 demonstrated that “remedies available at law, such as monetary damages, are inadequate to
 2 compensate” it. *eBay*, 547 U.S. at 391; *see also, e.g., Rent-A-Car Center Inc. v. Canyon Tele. &*
 3 *Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (economic injury can be remedied by
 4 damage award); *Oakland Trib., Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1375-76 (9th Cir. 1985)
 5 (no injunctive relief because claim of loss of circulation and revenue resulted in purely monetary
 6 harm measurable in damages); *Aurora World, Inc. v. Ty Inc.*, 719 F. Supp. 2d 1115, 1169 (C.D. Cal.
 7 2009) (“Loss of sales alone will not support a finding of irreparable injury ‘because acceptance of
 8 that position would require a finding of irreparable harm to every’ plaintiff regardless of
 9 circumstances.” (citation omitted)). Because Moonbug’s legal remedies are adequate, a permanent
 10 injunction is unwarranted. *E.g., Warner-Tamerlane Publ’g Corp. v. Leadsinger Corp.*, 2008 WL
 11 11334487, at *7 (C.D. Cal. Apr. 18, 2008) (refusing permanent injunction because legal remedies
 12 were adequate, despite finding that defendant willfully infringed over 200 of plaintiffs’ copyrighted
 13 compositions); *Brighton Collectibles, Inc. v. Pedre Watch Co.*, 2013 WL 5719071, at *5 (S.D. Cal.
 14 Oct. 21, 2013) (holding that the plaintiff had an adequate remedy at law where there were no
 15 indications that the defendant could not pay the statutory damages, and if future infringement
 16 occurred the plaintiff could be compensated by further damages).

17 Moonbug’s two contrary arguments are meritless. First, Moonbug’s rehashed irreparable
 18 harm argument (Mot. 13) is not viable for the reasons discussed above. Its attorney argument that
 19 this “type of customer confusion dilutes the CoComelon brand” and causes “loss of customers,
 20 reputation, goodwill, customer confusion” is unsupported by evidence. Mot. 13. Such speculation,
 21 not “grounded in any evidence,” must be rejected. *Herb Reed*, 736 F.3d at 1250. Second, Moonbug’s
 22 argument that an injunction is necessary to “enforce the jury’s verdict” on third-party platforms like
 23 YouTube (Mot. 13) is belied by its own assertions. According to Moonbug, YouTube “will not fully
 24 resolve Moonbug’s copyright complaints about Super JoJo content until the lawsuit is no longer
 25 pending and infringement has been adjudicated in Moonbug’s favor.” *Id.* (citing Dkt. 596 (McHale
 26 Dec.) ¶ 28, Ex. 25). If that is correct, Moonbug does not need an injunction; it will have what needs
 27 for YouTube once this litigation ends, and it has not articulated any harm likely to occur before
 28 then—much less anything qualitatively different between then and now (or the last four years).

C. The Balance Of Hardships Favors BabyBus.

To justify the extraordinary remedy of injunctive relief, Moonbug must show the balance of hardships weighs in its favor. *eBay*, 547 U.S. at 391. It does not and cannot.

Moonbug argues it will be irreparably harmed because “it will be unable to exclude or prevent Defendants from infringing Moonbug’s copyrights in CoComelon.” Mot. 14. But that argument fails because it inherently assumes that the “right to exclude” necessarily follows from infringement—a proposition the Supreme Court and the Ninth Circuit have flatly rejected. *eBay*, 547 U.S. at 392; *Flexible Lifeline Sys., Inc.*, 654 F.3d at 998.⁶ Moonbug’s speculation that BabyBus “could” infringe again (Mot. 14) is nothing but another way of saying all prevailing copyright plaintiffs are entitled to injunctions. It does not tip the balance in Moonbug’s favor, especially given money damages and attorneys’ fees would be available to compensate for any such harm. *E.g.*, *Herb Reed*, 736 F.3d at 1250 (rejecting “cursory and conclusory” allegations in support of injunction).

In contrast, the harm to BabyBus—a global leader in original children’s content—is real and substantial. The proposed injunction would enjoin BabyBus from, among other things, making any use of 13 “Super JoJo channels”—i.e., URL associated with YouTube accounts—(Dkt. 595-1 ¶ 2), irrespective of any content they may contain, infringing or not. YouTube *accounts* are not “original works of authorship fixed in any tangible medium of expression” subject to copyright. *See* 17 U.S.C. § 102(a). If Moonbug’s proposed injunction is enforced, it will result in the termination of those accounts, which currently have over 20 million subscribers. Dkt. 23 ¶ 6. Building that subscriber base took considerable time and resources, including millions of dollars. *Id.*⁷ Not only would the injunction destroy that investment, but it would have snowball effects on BabyBus’ other family of channels. When Moonbug got YouTube to suspend BabyBus’ Super JoJo channel at the start of this case, it caused a dramatic drop in the search engine standing of BabyBus’ other channels—which

⁶ *See also Greg Young Publ'g, Inc. v. Zazzle, Inc.*, 2020 WL 3871451, at *4 (C.D. Cal. July 9, 2020) (“[Plaintiff’s] argument that irreparable harm results from losing their exclusive right to control their copyright is inconsistent with *Flexible Lifeline Systems* because it means that copyright infringement leads to a per se presumption of irreparable harm.”).

⁷ There are a host of reasons why people subscribe to Super JoJo channels, such as the public domain nursery rhymes and kids songs on the channels. *See* Tr. 117:8-14 (Denson).

1 have more than 200 million subscribers. Dkt. 23 ¶ 8; Tr. 1520:20-1521:3. There is no justification
 2 to impose that harm again—permanently. The fact that the channels still use the “Super JoJo” name
 3 is irrelevant; copyright does not protect titles or names. 37 C.F.R. § 202.1(a) (excluding “[w]ords
 4 and short phrases such as names, titles, and slogans” from copyright protection). And BabyBus has
 5 removed any Super JoJo content from its Super JoJo channels. 9/1/23 Yan Dec., ¶ 5. Because
 6 nothing on the channels contains content that Moonbug even argued is infringing, the balance of
 7 harms sharply tilts in BabyBus’ favor. *See Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988)
 8 (rejecting injunction that would “effectively foreclose defendants from enjoying legitimate profits
 9 derived from exploitation of the ‘new matter’” they created).

10 **D. The Public Interest Would Not Be Served By An Injunction.**

11 Moonbug cannot demonstrate that “the public interest would not be disserved by a permanent
 12 injunction.” *eBay*, 547 U.S. at 391. “[T]he touchstone of the public interest factor is whether an
 13 injunction ... strikes a workable balance between protecting the [holder’s] rights and protecting the
 14 public from the injunction’s adverse effects.” *i4i Ltd. P’ship v. Microsoft Corp*, 598 F.3d 831, 863
 15 (Fed. Cir. 2010). Moonbug provides no viable argument that it would. Protection of Moonbug’s
 16 copyrights, its sole argument on this factor (Mot. 15), is fundamentally a private interest. The goals
 17 of copyright are to promote creativity and competition; rewarding the author is merely a secondary
 18 by-product. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429-430 (1984).
 19 Moonbug’s argument ignores that.

20 Moonbug also ignores the harm to the public interest if all Super JoJo content were enjoined,
 21 denying consumers the original aspects of BabyBus’ creative works and seriously curtailing
 22 competition in the preschool animation genre. *See Abend*, 863 F.2d at 1479 (injunction inappropriate
 23 where public would be denied opportunity to enjoy creative film expression). This is particularly
 24 problematic given Moonbug’s stated intent to “consolidate and dominate the preschool market.”
 25 TE 37 at 10, 16; *see* Tr. 982:8-15, 986:23-987:2 (Benoy) (testifying Moonbug’s business model is to
 26 buy preschool animation properties and that it had bought 18 properties as of May 2020); TE 37 at 6
 27 (“We are now the leading kids media company on digital platforms”). An injunction would only
 28 further Moonbug’s monopolistic efforts in the genre, effectively eliminating Moonbug’s chief

competitor in the space. *See Pass & Seymour, Inc. v. Hubbell, Inc.*, 532 F. Supp. 2d 418, 434 (N.D.N.Y. 2007) (denying an injunction where public interest would not have been served due to the “anti-competitive nature of such an injunction”). Further, by blessing Moonbug’s use of the “nuclear option” of fully shutting down a competitive channel, an injunction would chill third parties from competing against Moonbug—whether as to CoComelon or any of the other numerous preschool animation properties Moonbug has acquired.

Moreover, an injunction would disserve the public interest in avoiding economic waste by removing a valued, successful commodity in the market and millions of dollars that have been invested in developing the successful Super JoJo series. *See* 2 Dan B. Dobbs, *Law of Remedies* § 6.3(5) (2d ed. 1993) (“To the extent that destruction or even an injunction against distribution will prevent exploitation of economically viable materials, the problem is one of economic waste, certainly if the economic value of the plaintiff’s copyright is less than the economic costs entailed in the destruction or injunction”); *see also BR Assocs., Inc. v. Laframboise*, 2007 WL 1840031, at *10 (E.D. Mich. June 7, 2007) (denying injunction where it would result in economic waste).

II. NO LEGAL BASIS SUPPORTS THE INJUNCTION MOONBUG SEEKS.

Even if Moonbug could establish some entitlement to an injunction, it would not be entitled to the sweeping injunction it seeks. *See* Dkt. 595-1.⁸ Other than the Super JoJo videos for the six videos that BabyBus conceded on before trial, nothing in the verdict, the law, or the record supports granting an injunction against *any* other Super JoJo Content.

A. The Verdict Does Not Support Enjoining Most Specific Super JoJo Content.

The jury’s verdict does not support an injunction against the Super JoJo “series,” much less all Super JoJo “artwork” (including settings and characters that are wholly original to BabyBus and that Moonbug never contended were substantially similar to any of its copyrighted content, such as dinosaur museums, aquariums, neighbors, friends) or any other “products, or other Super JoJo

⁸ Moonbug’s proposed injunction defines “Super JoJo Content” as the “Super JoJo series, including any Super JoJo channels (or Super JoJo content on any other BabyBus channels), applications, artwork (e.g., webpage banners, video thumbnails, channel profile pictures, and other images), characters, episodes, videos, products, or other Super JoJo materials.” Dkt. 595-1 at ¶ 1(a).

1 materials” that were not even argued to be infringing at trial. Dkt. 595-1 at 2. The verdict reflects
 2 that the jury found BabyBus infringed 39 Moonbug copyrights. Dkt. 579 (“[D]id Babybus infringe
 3 the registered copyrights to the following works?”). Crucially, the verdict does not reflect *what*
 4 *content infringed* those copyrights. Was it a downloaded *CoComelon* video or captured screenshot
 5 (which are improper bases for an infringement finding)? Specific *Super JoJo* videos for which
 6 Moonbug presented comparisons? Thumbnail images or banners (an improper basis for infringement
 7 of any copyrighted video)? Original character animation? Redesigned character animation?
 8 Something else? The verdict is silent. But without those findings, the verdict cannot support
 9 permanently enjoining all Super JoJo Content.

10 The jury’s verdict does not support an injunction against the Super JoJo “series,” much less
 11 all Super JoJo “artwork” (including settings and characters that are wholly original to BabyBus and
 12 that Moonbug never contended were substantially similar to any of its copyrighted content, such as
 13 dinosaur museums, aquariums, neighbors, friends) or any other “products, or other Super JoJo
 14 materials” that were not even argued to be infringing at trial. Dkt. 595-1 at 2. The verdict reflects
 15 that the jury found BabyBus infringed 39 Moonbug copyrights. Dkt. 579 (“[D]id Baby[B]us infringe
 16 the registered copyrights to the following works?”). Crucially, the verdict does not reflect *what*
 17 *content infringed* those copyrights. Was it a downloaded *CoComelon* video or captured screenshot
 18 (which are improper bases for an infringement finding)? Specific *Super JoJo* videos for which
 19 Moonbug presented comparisons? Thumbnail images or banners (an improper basis for infringement
 20 of any copyrighted video)? Original character animation? Redesigned character animation?
 21 Something else? The verdict is silent. But without those findings, the verdict cannot support
 22 permanently enjoining all Super JoJo Content.

23 Indeed, the verdict does not reflect whether the jury found *any Super JoJo videos* infringing.
 24 Moonbug repeatedly emphasized to the jury that BabyBus had downloaded copyrighted CoComelon
 25 videos and captured screenshots from CoComelon videos and stored them on its China-based file
 26 server. *See, e.g.*, Tr. 249:19-250:11 (Pltfs’ Opening) (“Forty downloaded CoComelon episodes ...
 27 BabyBus downloaded those ... Not just 40 CoComelon episodes; 261 CoComelon images”); Tr.
 28 1861:1-17 (Pltfs’ Closing) (“We saw their planning development files. CoComelon images scattered.

1 CoComelon videos. CoComelon links. They were plastered throughout[.]”); Tr. 648:8-11 (Mr. Yan)
 2 (“Q. And BabyBus has copies of CoComelon episodes in its production files for Super JoJo? A. Yes.
 3 I did discover that in our server, in our files, there existed CoComelon’s video -- videos.”); Tr.
 4 650:17-19 (Yan) (questioning about “at least 40 unique episodes of CoComelon in BabyBus’
 5 production”); Tr. 651:15-16 (questioning about “261 CoComelon images in Super JoJo’s
 6 production”). The jury’s findings may have been based on these actions, which cannot be a basis for
 7 infringement (as discussed in Section II.B.1). Indeed, the jury’s finding of virtual identity confirms
 8 the *unlikelihood* that infringement was based on any Super JoJo content containing BabyBus’ *JoJo*
 9 character because the Court already found JoJo not virtually identical to JJ as a matter of law. *See*
 10 Dkt. 242 at 26 (“The asserted and accused videos are not identical or nearly identical. They feature
 11 non-identical characters, as discussed above, and they are not the same frame-by-frame.”). Further,
 12 Moonbug’s theory that all Super JoJo Content infringes is at odds with the jury finding that
 13 Moonbug’s Soccer Song video was not infringed *at all*—which it would have been if the verdict
 14 were based on the jury finding infringement based on the JoJo character(s) infringing the JJ
 15 character(s) in Moonbug’s videos. *See* Dkt. 579 at 5.

16 The inadequacy of the verdict form is a problem Moonbug itself is responsible for. Moonbug
 17 successfully sought a verdict form that did not ask the jury to make any specific determinations of
 18 what infringed. Dkt. 335. And it opposed BabyBus’ proposed form (Dkts. 459 & 459-1), which
 19 would have had the jury specifically identify any accused videos(s) that it found to be infringing.
 20 *E.g.*, Dkt. 345 at 7:2-9. BabyBus’ proposed verdict form (and jury instructions) would have
 21 (i) ensured liability was predicated on the accused videos (as opposed to something else, like server
 22 copies), and (ii) identified which particular videos, if any, other than the conceded videos could be
 23 an appropriate subject for an injunction. *See* Dkt. 567 at 2, 5. As BabyBus argued in advocating for
 24 such a form, it was “critical” for the jury to identify which Super JoJo works infringed for “injunctive
 25 relief.” Dkt. 459 at 4, Dkt. 345 at 7; Dkt. 567 at 5; *see also Floyd v. Laws*, 929 F.2d 1390, 1395 (9th
 26 Cir. 1991) (“[C]ourts often submit special interrogatories to juries[] to establish a factual basis for
 27 testing the correctness of verdicts and ascertaining their extent.”). As BabyBus explained,
 28 a “particularized finding” of “whether each of the accused works is infringing,” “is important for ...

determining the scope of potential injunctive relief,” and “will not be available if the Court adopts Plaintiffs’ verdict form.” Dkt. 345 at 2-3.

Having made its tactical decision to fast-track jury deliberations while sacrificing knowledge, with full knowledge of the consequences of that which it now faces at the injunction stage, Moonbug cannot now claim that verdict supports an injunction as to all “Super JoJo Content.” To hold otherwise would allow Moonbug to improperly profit by its own litigation tactics. *See, e.g., U.S. v. Sturdivant*, 244 F.3d 71, 77-78 (2d Cir. 2001) (“Principles of equity prohibit [plaintiff] from benefiting from the prejudicial ambiguity that [plaintiff] alone was responsible for creating. It was [plaintiff] which . . . decided not to seek a special verdict.”); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001) (noting equitable principles are “to protect against a litigant playing fast and loose with the courts” (citation omitted)). Moonbug cannot meet its strict burden of proof with respect to the far-ranging injunction it seeks based on the jury verdict.

B. The Court Cannot Decide As A Matter Of Law That Most Of The Super JoJo Content Should Be Enjoined.

1. The Jury Verdict Precludes An Injunction Against Most Super JoJo Content.

The jury’s finding that the Soccer Song copyright was not infringed (Dkt. 579 at 5) disproves Moonbug’s theory that the mere presence of JoJo (or any other characters) in a video infringes all Moonbug’s copyrights that include JJ (or any other characters). *See, e.g.,* Dkt. 546 at 10 (arguing all accused videos feature JoJo and they “copy CoComelon[]” because they depict “JoJo or the redesigned JoJo” and “the family characters”); *id.* at 12 (arguing accused videos copied the “Animal Characters”); *id.* at 15 (arguing “all Super JoJo episodes infringe all the CoComelon Works”). The Soccer Song extensively features all the CoComelon characters at issue in this case: the JJ character, the family characters, and the animal characters. TE 1196 (CoComelon Soccer Song). Yet the jury found that none of the Super JoJo works—including JoJo and his family characters—infringed CoComelon’s Soccer Song. Dkt. 579 at 5. Thus, while the verdict form does not illuminate specific infringing content, it does provide this one significant clue as to what was *not* found to infringe.

This precludes an injunction based solely on the Super JoJo characters: where a jury decides legal claims and a judge decides equitable claims on the same facts, the Seventh Amendment requires

1 the judge to follow the jury's implicit or explicit factual determinations in deciding the equitable
 2 claims. *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993); *see*
 3 *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991); *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498,
 4 507 (9th Cir. 1989). Moonbug's copyright infringement claims are classic "legal claims" on which
 5 the jury's "implicit and explicit" findings bind the Court. *See, e.g., Danjaq LLC v. Sony Corp.*, 263
 6 F.3d 942, 962 (9th Cir. 2001) ("McClory has a constitutional right to a jury trial on his copyright
 7 infringement claims"). As the Ninth Circuit has repeatedly emphasized, "the intrinsic test ... is
 8 exclusively the province of the jury." *Funky Films, Inc. v. Time Warner Entm't Co. L.P.*, 462 F.3d
 9 1072, 1077 (9th Cir. 2006). The Court acknowledged this in its summary judgment rulings and in
 10 the jury instructions. *See, e.g.,* Dkt. 242 at 9-10; Dkt. 562 at 17.

11 Thus, to the extent Moonbug's Motion seeks a judgment as a matter of law that all Super JoJo
 12 Content directly infringes Moonbug's 39 copyrighted works found infringed in the verdict form, it
 13 should be denied because the Court cannot issue an injunction contrary to the jury's verdict.

14 2. The Record Does Not Otherwise Support The Requested Injunction.

15 Even if it were procedurally proper for the Court to base an injunction on an independent
 16 determination that all "Super JoJo Content" infringes, the record does not support such a finding. To
 17 establish infringement by any particular Super JoJo work, Moonbug was required to prove that
 18 actionable content was "substantially similar" to Moonbug's "protectable expression." *See, e.g.,*
 19 *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1117 (9th Cir. 2018) (emphasis added). It did not and
 20 cannot. *See* Dkt. 537 at 10-23 (BabyBus' Rule 50(a) motion).

21 **First**, the CoComelon content (videos and screen shots) copied on to BabyBus' servers is not
 22 actionable and cannot be grounds for an injunction (or finding of infringement). Those acts were all
 23 initiated outside of the United States, and the resulting files were stored outside the United States.
 24 Tr. 249:22-250:5. "[B]ecause the infringing act of downloading the material occurred on a computer
 25 outside the United States, there was no act in the United States to establish jurisdiction." *Superama*
 26 *Corp., Inc. v. Tokyo Broad. Sys. Television, Inc.*, 830 F. App'x 821, 823 (9th Cir. 2020); *see also*
 27 *Allarcom Pay Television, Ltd. v. Gen. Instrument Corp.*, 69 F.3d 381, 387 (9th Cir. 1995) (similar).

1 This is because copyrights “do not have extraterritorial effect.” *Impression Prod., Inc. v. Lexmark*
 2 *Int’l, Inc.*, 137 S. Ct. 1523, 1528 (2017).

3 **Second**, an injunction against all Super JoJo Content cannot be premised on BabyBus’
 4 thumbnail art, as Moonbug expressly invited the jury to find. *See* Tr. 425:8-9 (Tyz) (arguing
 5 thumbnails “go[] to the question of whether they copied the character”); Tr. 425:12-13 (Tyz) (arguing
 6 “similarities in thumbnail art is highly probative of their infringement”); Tr. 492:12-495:24,
 7 499:4-501:2, 504:2-505:3, 539:19-540:5, 541:4-12 (Yan) (Tyz eliciting pages of testimony about
 8 thumbnail “plagiarism”); *see also* Dkt. 546 at 25 (arguing “the jury can find infringement based on
 9 Defendants’ copying of CoComelon thumbnails” (cleaned up)). But the uncontroverted record
 10 establishes the Super JoJo thumbnail art was not screen captures from BabyBus videos. Tr.
 11 1440:8-11 (Zhang) (“Q. For any of the thumbnails you looked at, did any of the thumbnail art copy
 12 an image from the video that was associated with it? A. No.”); Tr. 1578:6-8 (Yan) (“Q. Are the
 13 Super JoJo thumbnail images screenshots that are captured from the videos? A. No.”). Even more
 14 importantly, Moonbug did not introduce evidence that its own thumbnails are either copyrighted or
 15 are screenshots from Moonbug’s copyrighted videos. Accordingly, there is no legally supported
 16 basis for finding that any BabyBus 2D thumbnail art is substantially similar to the overall look and
 17 feel of any of any Moonbug copyrighted *video*, much less for finding that any thumbnail art
 18 establishes infringement by any Super JoJo *video*.

19 **Third**, as to 340 of the 368 Super JoJo videos at issue, Moonbug merely relied on
 20 Mr. Krause’s testimony that the videos copied the JJ character and other general concepts.
 21 Tr. 811:25-16 (“the JJ character”; “the way the JJ character is shown and portrayed and animated
 22 and moving,” “the relationship between the family and the JJ character,” “the themes, the moods, the
 23 color, the design, the pacing and setting, the animation style, the cinematography, the way it interacts
 24 with songs.”). Those generic, categorical assertions fall far short of identifying specific, protectable
 25 expression in each video to find that all of it infringes. That is especially so because the videos use
 26 different animation styles (such as characters dancing against abstract backgrounds (TE 794 at 1:27)
 27 and animated characters mixed with live-action human actors (TE 743 at 0:44)), different settings
 28 (such as the beach (TE 502), the city (TE 720), and the market (TE 547)), and different plots and

1 sequences of events (such as going camping (TE 593), getting a haircut (TE 550), and bringing a pet
2 to the veterinarian (TE 592)).⁹

3 **Finally**, the record does not support finding infringement of the characters. As for
4 Moonbug’s JJ, Mr. Krause identified only a handful of highly generic traits, which even he admitted
5 were “unprotectable ideas.” *See* Tr. 866:16-22. But even if some combination of those elements
6 were expressed in a protectable way, the expression in BabyBus’ JoJo (hair shape, hair color, eye
7 color, teeth shape, head shape, face proportions, clothes, names) is substantially different. JJ’s
8 “conceptual qualities” fare no better; traits like being “curious,” “optimistic,” “wanting to be in the
9 middle of things,” and “trying to figure out the next lesson” are generic descriptions of a typical 3.5-
10 year-old. Nor is there evidence of protectable physical or conceptual traits of JJ’s family members.
11 Instead, the family characters are described in the broadest possible terms: a “clever” mom, a “goofy”
12 dad, “patient” siblings. Tr. 762:8-13, 822:8-22. These are not protectable elements, and once filtered
13 out, as the extrinsic test requires, no substantial similarity remains to even proceed to the intrinsic
14 test. *E.g., Rentmeester*, 883 F.3d at 1121 (“[T]he works at issue here are as a matter of law not
15 substantially similar. Just as Rentmeester made a series of creative choices in the selection and
16 arrangement of the elements in his photograph, so too Nike’s photographer made his own distinct
17 choices in that regard. Those choices produced an image that differs from Rentmeester’s photo in
18 more than just minor details.”); *see also Data East USA, Inc. v. Epyx, Inc.*, 862 F. 2d 204, 209 (9th
19 Cir. 1988) (reversing permanent injunction because “it was clear error for the district court to
20 determine that protectable substantial similarity existed based upon these facts,” in which “the
21 similarities result from unprotectable expression”).¹⁰

23 ⁹ In any event, things like “animation style” or “look” of a show are not protectable by copyright.
24 *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1135 (C.D. Cal. 2007).

25 ¹⁰ Moreover, as a matter of law, the court must assess the scope of protection—thin or thick—after
26 filtering out unprotectable elements *claimed to be similar*—**not** based on the generic question of
27 whether a different range of expression was *possible if* the defendant had made different choices,
28 *e.g.*, as to gender, ethnic background, hairstyle. *See, e.g., Apple Comp., Inc. v. Microsoft Corp.*, 35
F.3d 1435, 1447 (9th Cir. 1994) (“Having correctly found that almost all the similarities spring either
from the license or from [other unprotectable elements], [the district court] correctly concluded that
illicit copying could occur only if the works as a whole are virtually identical.”). A defendant’s

1 **III. THE PROPOSED INJUNCTION IS ALSO IMPROPER AND UNWORKABLE.**

2 **A. Moonbug’s Injunction Is Not Narrowly Tailored To The Specific Conduct**
 3 **Found To Infringe.**

4 A permanent injunction must be specific and narrowly tailored. Fed. R. Civ. P. 65(d)(1)
 5 (“Every order granting an injunction . . . must . . . (B) state its terms specifically; and (C) describe in
 6 reasonable detail . . . the act or acts restrained or required.”). “Injunctive relief must be tailored to
 7 remedy the specific harm alleged” and an overbroad injunction “is an abuse of discretion.” *NRDC,*
 8 *Inc. v. Winter*, 508 F.3d 885, 886 (9th Cir. 2007) (citing *Lamb-Weston, Inc. v. McCain Foods, Ltd.*,
 9 941 F.2d 970, 974 (9th Cir. 1991); see *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 998 (N.D. Cal.
 10 2006) (“an injunction must be narrowly tailored . . . to remedy only the specific harms shown by the
 11 plaintiffs, rather than ‘to enjoin all possible breaches of the law’) (citation omitted).

12 Limiting the scope of injunctive relief is especially important in copyright cases where, due
 13 to constitutional concerns, “the scope of the injunction should be coterminous with the infringement.”
 14 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 14.06[C]. “Injunctive relief should be narrowly
 15 tailored to fit specific legal violations.” *Waldman Publ’g Corp. v. Landoll, Inc.*, 43 F.3d 775, 785
 16 (2d Cir. 1994). Thus, a court “should only include injunctive terms that have a common sense
 17 relationship to the needs of the specific case, and the conduct for which a defendant has been held
 18 liable.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Inc.* (“*Grokster*”), 518 F. Supp. 2d 1197,
 19 1226. A district court abuses its discretion by issuing an injunction that exceeds the jury’s
 20 infringement findings. *Starter Corp. v. Converse, Inc.*, 170 F.3d 286, 300 (2d Cir. 1999); see

21
 22 decision to use a “manifestly conventional arrangement” of elements, *Gray v. Hudson*, 28 F. 4th 87,
 23 101-02 (9th Cir. 2022), or other elements that “flow naturally from a basic . . . premise,” *Berkic v.*
 24 *Crichton*, 761 F. 2d 1289, 1293 (9th Cir. 1985), does not entitle a plaintiff to a broader scope of
 25 protection regarding resulting similarities; “that is the penalty an author must bear for marking them
 26 too indistinctly,” *Olson v. National Broadcasting Co., Inc.*, 855 F. 2d 1446, 1452 (9th Cir. 1988)
 27 (citation omitted). See also *See v. Durang*, 711 F. 2d 141, 143 (9th Cir. 1983) (affirming summary
 28 judgment for defendant where “the court properly applied the [scenes a faire] doctrine to hold
 unprotectable forms of expression that were either stock scenes or scenes that flowed necessarily
 from common unprotectable ideas,” explaining that “‘Common’ in this context means common to
 the works at issue, not necessarily, as plaintiff suggests, commonly found in other artistic works.”).
 Because JoJo is not virtually identical to JJ as a matter of law (Dkt. 242 at 23, 26), the Super JoJo
 characters cannot support an injunction.

1 *Chicago Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624, 632 (7th Cir. 2003) (sua sponte reversal of
2 injunction that prohibited forms of copyright infringement beyond those resolved in the litigation).¹¹

3 Moonbug’s requested injunction is far from “narrowly tailored,” and it is completely divorced
4 from the jury’s findings. The proposed injunction seeks to bar BabyBus from making any use of any
5 “Super JoJo Content”—irrespective of whether it was introduced at trial, has any similarity to the
6 Super JoJo works at issue at trial, or even is in the same category of work introduced at trial. Dkt.
7 595-1 ¶ 1 (enjoining Super JoJo “applications, artwork ..., characters, episodes, videos, products, or
8 other Super JoJo materials” and enjoining BabyBus from “engaging in any activity that infringes
9 Plaintiffs’ rights in the infringed CoComelon Works”). This is not “coterminous with the
10 infringement,” *Nimmer on Copyright* § 14.06[C], and it is improper.¹²

11 No injunction can survive the narrowly tailored test on the current record except for one
12 enjoining the specific conceded videos. This is due to the vague and ambiguous verdict form, and
13 the insufficiency of the record to support infringement as to any other video, the thumbnail art, other
14 channel art, and the channels themselves. *See* Section II. To enter an injunction as to works that
15 were never alleged to be at issue, without any showing that they bear any “substantial similarity” to
16 the asserted works, is fundamentally unfair and inconsistent with basic principles of equity. *See New*
17 *Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d
18 778, 782 (9th Cir. 2001). Thus, any injunction “should not include acts” that go beyond the
19 infringement proven at trial. *Grokster*, 518 F. Supp. 2d at 1208. As discussed in Section II.B,
20 Moonbug proposal does. Indeed, it goes beyond infringement theories even presented at trial.

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24 ¹¹ “Because copyright law ultimately serves the purpose of enriching the general public through
25 access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated
26 as clearly as possible.” *Fogarty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *see also Feist Publ’ns.,*
27 *Inc. v. Rural Tel. Service Co., Inc.*, 499 U.S. 340, 349-50 (1991) (“The primary objective of copyright
is not to reward the labor of authors, but ‘to promote the Progress of Science and useful Arts.’ To
this end, copyright assures authors the right to their original expression, but encourages others to
build freely upon the ideas and information conveyed by a work.”) (citation omitted).

28 ¹² Indeed, it is difficult to imagine how BabyBus could comply with a demand to remove its channels
without facing exposure for spoliation of evidence. *But see* 595-1 at ¶ 2.

B. The Proposed Injunction Fails Rule 65(d)'s Specificity Requirements.

Rule 65 requires that every injunction state its terms specifically, and describe in reasonable detail, and not by referring to the complaint or other document, the act or acts restrained or required. Fed. R. Civ. P. 65(d). This is not a procedural nicety but a fundamental due process consideration. “Rule 65(d) is no mere extract from a manual of procedural practice. It is a page from the book of liberty.” *H. K. Porter Co., Inc. v. Nat’l Friction Prods.*, 568 F.2d 24, 27 (7th Cir. 1977). Rule 65 requires that an ordinary person reading the injunction can ascertain from the document itself “exactly what conduct is prescribed.” *Grokster*, 518 F. Supp. 2d at 1228 n.24 (C.D. Cal. 2007), quoting 11A Charles Alan Wright & Arthur R. Miller, *FEDERAL PRACTICE AND PROCEDURE*, § 2955 (3d ed.); see *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006) (“The benchmark for clarity and fair notice is not lawyers and judges, who are schooled in the nuances of [the] law,” but instead the “lay person, who is the target of the injunction.”). Rule 65 is meant to “prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1047 (9th Cir. 2013) (citation omitted).

An injunction that merely tracks section 106 of the Copyright Act and purports to simply prohibit possible breaches of the law is not sufficiently precise and tailored. See *Craigslist Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1062 (N.D. Cal. 2010) (“Generally, an injunction must be narrowly tailored to remedy only the specific harms shown by a plaintiff, rather than to enjoin all possible breaches of the law”); *Nat’l Labor Relations Bd. v. Express Publ’g Co.*, 312 U.S. 426, 435 (1941) (holding that “the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation”). Yet Moonbug’s proposed injunction does that. See, e.g., Dkt. 595-1 ¶ 1(c) (seeking to enjoin BabyBus from “engaging in any activity that infringes Plaintiffs’ rights in the infringed CoComelon Works”); compare also 17 U.S.C. § 106 with Dkt. 595-1 ¶ 1(a), (b).

Further, for an injunction to satisfy Rule 65’s specificity requirements, it must identify the specific protectable expression in each work that BabyBus is prohibited from infringing. See, e.g.,

1 *Patriot Homes, Inc. v. Forest River Hous., Inc.*, 512 F.3d 412, 415-16 (7th Cir. 2008) (vacating
 2 injunction under Rule 65(d) because the district court failed to “identify each and every element of
 3 copyright originality”; “[defendant] cannot tell, and neither can we, whether using [certain]
 4 information ... would violate the injunction”); *Chi. Bd. of Educ. v. Substance, Inc.*, 354 F.3d 624,
 5 632 (7th Cir. 2003) (striking down injunction that applied not only to the works at issue but also to
 6 any other like works that plaintiff might create at any time in the future); *Mon Cheri Bridals, Inc. v.*
 7 *Wu*, 2008 WL 4534191, at *6 (D.N.J. Oct. 7, 2008) (denying permanent injunction to prevailing
 8 copyright infringement plaintiff because “the difficulty in crafting an injunction to address specific
 9 legal violations that would not infringe upon Defendant’s ability to produce unprotectable elements
 10 in future dress designs, makes it improper for the Court to issue injunction relief in favor of
 11 Plaintiff”). On this record, where the Court has not stated any findings as to what original and
 12 protectable content was infringed, there is no factual predicate for the required specificity. *Cf.* Dkt.
 13 468 at 20 (BabyBus arguing that “the jury should not be left without guidance about what elements
 14 are protected and which are not. ... [T]he Court should provide the jury a complete list of what
 15 elements have been found unprotectable, and (if any) protectable.”); Dkt. 554 at 27-32 (BabyBus
 16 proposing instructions Nos. 14(a)-(c) with charts identifying protectable and unprotectable elements,
 17 as used in *Mattel* after reversal); Dkt. 567 at 4 (BabyBus’ continued objection to instructions that
 18 leave the jury “without guidance about what elements ... are protected and which are not”).

19 Indeed, the proposed injunction fails even to identify the “infringed CoComelon Works”
 20 within its four corners. Instead, Moonbug’s proposed injunction improperly requires reference to
 21 external documents, namely, the jury’s verdict, to discern which works are infringed. *See, e.g.*,
 22 *Corning Inc. v. PicVue Elecs., Ltd.*, 365 F.3d 156, 158 (2d Cir. 2004) (reversing injunction that did
 23 not identify the infringed copyrighted works and defendant would have to “resort to extrinsic
 24 documents to comply with the order’s commands”; it was thus “not possible ‘to ascertain to ascertain
 25 from the four corners of the order precisely what acts are forbidden’” (citation omitted)).

26 Without the required specificity, BabyBus will not have fair notice of what specific acts the
 27 injunction prohibits. Parties cannot be “left ... in the dark as to their duty toward the court.” *Regal*
 28

1 *Knitwear v. N.L.R.B.*, 324 U.S. 9, 15 (1945). Injunctions are “not for the entrapment of parties, and
2 courts no less than parties desire to avoid unwitting contempts.” *Id.*

3 **C. Additional Problems With The Proposed Injunction Compel Denial of**
4 **Moonbug’s Motion.**

5 Two other flaws render Moonbug’s proposed injunction improper.

6 First, Moonbug seeks to require BabyBus to “provide notice and a copy” of the injunction to
7 third-party entities, including Google, Amazon, Roku, and “any other distributors or other third
8 parties who have ever published or distributed Super JoJo Content on or through any United States-
9 based platform or media.” Dkt. 595-1 ¶ 4. But requiring BabyBus to provide notice of any injunction
10 to third parties which it has conducted business with is unwarranted. *John Wiley & Sons, Inc. v. Book*
11 *Dog Books, LLC*, 327 F. Supp. 3d 606, 639 (rejecting proposed injunctive relief requiring Defendants
12 “to provide notice of this Permanent Injunction to all entities that it conducts business with, including
13 Amazon, Barnes & Noble, and eBay” because such relief is afforded in false advertising cases, unlike
14 copyright infringement cases). Moreover, the request for BabyBus to notify any third party who has
15 ever published Super JoJo content—regardless of whether BabyBus has ever had any affiliation or
16 communication with that third party—is patently overbroad and unreasonable. What Moonbug seeks
17 to do is impermissibly shift the burden of policing its copyrights onto BabyBus. Courts considering
18 that issue routinely hold that a copyright or trademark owner is responsible for policing infringement.
19 *See, e.g., Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007) (“We decline to shift
20 a substantial burden [of preventing infringement] from the copyright owner to the provider[.]”).

21 Second, Moonbug’s request for a permanent injunction in perpetuity violates constitutional
22 principles, which limits the duration of protection of each copyrighted work under the Copyright Act.
23 *See Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (explaining the Constitution
24 requires that copyrights exist for a limited duration). Thus, the longest permissible duration of any
25 injunction here is “however many years [the copyrights’] term may continue to subsist—but not past
26 that expiration.” 5 Nimmer on Copyright § 14.06.

1 **IV. IN THE ALTERNATIVE, THE COURT SHOULD DELAY ISSUING AN ORDER**
 2 **IDENTIFYING TERMS OF AN INJUNCTION OR DELAY ITS ENFORCEMENT.**

3 The Court need not attempt to conclusively rule on Moonbug’s motion now. It can deny the
 4 motion without prejudice to renew after the Rule 50(b) motion and/or appeal is resolved.
 5 Alternatively, if the Court determines at this stage that some injunctive relief is warranted, the ruling
 6 on this motion can reserve the proper scope of injunctive relief, leaving it subject to amendment,
 7 until after resolution of BabyBus’ Rule 50(b) motion. As the discussion in Section II reflects,
 8 significant problems exist with the jury verdict, and resolution of BabyBus’ Rule 50(b) motion may
 9 significantly affect the Court’s view of the proper scope of injunctive relief. Further, as discussed
 10 below, BabyBus would seek to stay enforcement of Moonbug’s proposed injunction pending that
 11 resolution and/or appeal. If the Court decides to rule on the motion now, issuing a ruling that reserves
 12 the issue of scope of injunction for later amendment following resolution of BabyBus’ Rule 50(b)
 13 motion will conserve judicial resources and best “secure the just, speedy, and inexpensive
 14 determination of [this] action and proceeding.” Fed. R. Civ. P. 1.

15 Alternatively, if the Court grants any injunction (other than as to the conceded videos), the
 16 Court should stay its implementation long enough to allow BabyBus to move for a stay under
 17 Rule 62. In deciding a stay under Rule 62, courts consider four factors: “(1) whether the stay
 18 applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the
 19 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially
 20 injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v.*
 21 *Braunskill*, 481 U.S. 770, 776 (1987). The “factors contemplate individualized judgments in each
 22 case.” *Id.* at 777.

23 BabyBus is likely to succeed on the merits of the substantial questions of law this case
 24 presents. As but one example, the lack of a jury instruction that specifically identified unprotectable
 25 elements in the asserted works resulted in reversible error. When a copyright infringement claim is
 26 based on a combination of unprotectable elements, controlling Ninth Circuit law “require[s] that the
 27 unprotected elements be identified to the jury” in instructions. *Dream Games of Arizona, Inc. v. PC*
 28 *Onsite* (“*Dream Games*”), 561 F.3d 983, 988 (9th Cir. 2009) (citing *Apple Computer v. Microsoft*

1 *Corp.*, 35 F.3d 1435, 1446 (“the unprotectable elements have to be identified”). The Ninth Circuit
 2 rule is clear: a district court must provide jury instructions that “identif[y] in detail those elements of
 3 the copyrighted work that are not protected.” *Dream Games*, 561 F.3d at 989 (explaining that the
 4 jury instructions must identify unprotectable elements specific to the works at issue, not just generally
 5 instruct the jury to filter out unspecified “stock” or “common” features). The jury instructions here
 6 fell short of this mandate. *See* Dkt. 562 at 12 (No. 10) (providing generic descriptions of
 7 unprotectable material not specific to CoComelon); *id.* at 16 (No. 14) (same). This legal error was
 8 prejudicial. *See Dream Games*, 561 F.3d at 989 (prejudicial error results when the instructions failed
 9 to cover the applicable law “fairly and correctly”). As BabyBus explained in its objections to the
 10 jury instructions, identifying the specific unprotectable elements was necessary “so that the jury does
 11 not form the mistaken impression that all elements Plaintiff[s] have identified regarding JJ are
 12 protectable.” Dkt. 468 at 10; *see* Dkt. 554 at 16 (same); Dkt. 567 at 1 (reiterating objection). This
 13 prejudicial error alone compels a new trial, not to mention the multiple other substantial questions of
 14 law for which BabyBus has high likelihood of success in post-trial motions and/or appeal. *See, e.g.*,
 15 Section II.B.2.

16 The other factors support staying any injunction in this action too, including the irreparable
 17 harm that BabyBus would face under Moonbug’s unworkable and vague injunction,¹³ the lack of
 18 harm to Moonbug from a stay (which would merely keep the *status quo* that has existed for years),
 19 and the serious interest in enriching the general public through access to creative works (*see*
 20 Section I). Accordingly, if the Court grants an injunction, it should afford BabyBus sufficient time
 21 to move for a stay before requiring compliance with the injunction.

22 CONCLUSION

23 BabyBus respectfully requests that the Court deny Moonbug’s Motion and not issue an
 24 injunction.

25
 26 _____
 27 ¹³ For example, the proposed injunction would terminate BabyBus YouTube accounts with tens of
 28 millions of followers gained over many years, leading to incalculable damages to BabyBus’ business
 and brand. That harm would be irreparable if the Ninth Circuit reversed the injunction or the
 judgment.

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